Supreme Court, U.S.
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No. 01-238

IN THE

Supreme Court of the United States

BMW MANUFACTURING CORPORATION,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF

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Three underlying and recurring themes are raised by respondent in its brief in opposition (Br. in Op.). Those contentions are addressed below.

1. Respondent defends its imposition of the Harbor Maintenance Tax (HMT) on foreign goods admitted to foreign trade zones and subzones (FTZ) by noting that the statute imposes a tax on port use by importers which must be paid "at the time of unloading." Br. in Op. 2 and 5. Respondent reasons that because petitioner unloaded foreign goods at a port prior to their admission to an FTZ, the goods are subject to HMT imposition.

Respondent correctly describes the applicability of the HMT to imported goods in its introductory paragraph of its Statement section.

> The tax [HMT] is imposed at the rate of "0.125 percent of the value of the commercial cargo involved." 26 U.S.C. 4461(b). For "cargo entering the United States," the tax is imposed on the importer "at time of unloading." 26 U.S.C. 4461(c)(1)(A), (2)(B).

Br. in Op. 2. Petitioner does not contest that its goods were unloaded at a port; rather, petitioner's challenge is based upon the FTZ admission of foreign goods not satisfying the "cargo entering the United States" prerequisite.

In selecting the U.S. Customs Service to administer and enforce the HMT, Congress well appreciated that Customs' "substantial body of law relating to the importation of merchandise and the collection of customs duties" would "apply with regard to the port user fee charges imposed by the committee amendment as if such charges were customs duties." H. Rep. No. 99-228, 99th Cong. 2d Sess. 10 (1986), *reprinted in* U.S.C.C.A.N. 6705, 6714-15. All customs administrative and

enforcement provisions apply to the HMT as if it were a customs duty. 26 U.S.C. § 4462(f)(1). In accordance with customs administrative and enforcement provisions, "cargo entering the United States" refers to the clearance of goods into the customs territory of the United States following the filing, with Customs, of appropriate documentation by the importer of record. 19 U.S.C. § 1484. *See Wolff Shoe Co. v. United States*, 141 F.3d 1116, 1118 (Fed. Cir. 1998).

Based upon carefully considered and well documented international trade policy considerations, and as embodied in 19 U.S.C. § 81c(a), the United States created a legal fiction wherein foreign goods physically located within its borders are, for customs administrative and enforcement purposes, considered to be outside the United States when admitted to a FTZ. "[T]hough located on United States soil — [a foreign-trade zone] receives treatment under the customs laws as a territory outside the United States." *Ford Motor Co. v. United States*, 157 F.3d 849, 852 (Fed. Cir. 1998). Because cargo that has not entered the United States is not subject to the HMT, FTZ admitted foreign goods are not subject to the HMT.

While fashioning the legislation that in 1986 became the HMT statute, Congress was fully cognizant that cargo entering the United States would not include FTZ admitted goods, unless expressly provided. In 1980 a tax on "petroleum products entered into the United States for consumption, use, or warehousing" was established by 26 U.S.C. § 4611(a)(2). To impose the tax on foreign-trade zone admissions, Congress explicitly defined "United States" to include foreign-trade zones for petroleum tax purposes. 26 U.S.C. § 4612(a)(4)(C).[1] Statutorily defining

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1. 26 U.S.C. § 4612(a)(4)(C) provides:

(a) Definitions — For purposes of this subchapter —

* * *

(Cont'd)

the "United States" to include FTZs was also incorporated in the chemical tax, 26 U.S.C. § 4662(a)(2), and the ozone depleting tax, 26 U.S.C. § 4682(e)(2). In contrast, Congress did not define the "United States" as including foreign-trade zones for HMT purposes.[2]

2. Relying upon the statutory construction principle of *expressio unuis est exclusio alterius*, respondent (as well as the court of appeals) reasons that Congress' failure to expressly include an FTZ exemption within the HMT statute is proof that none was intended. Br. in Op. 4 and 7.

First, if, as petitioner contends, FTZ admissions of foreign goods do not constitute "cargo entering the United States," there would be no need for a FTZ exemption because FTZ admissions would not be embraced by the HMT in the first instance. Second, despite its contention that all exemptions must be expressly set forth within the four corners of the HMT statute, respondent acknowledges that a customs statutory exemption not enumerated therein nevertheless applies to the HMT. Br. in Op. 7-8 n.6. In *Citgo Petroleum Corp. v. United States*, 104 F. Supp. 2d 106 (Ct. Int'l Trade 2000) (no appeal taken) the Court of International Trade ruled that the HMT could not be imposed

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(Cont'd)

> (c) United States includes foreign trade zones. — The term "United States" includes any foreign trade zone of the United States.

2. Enactment of the petroleum tax and chemical tax occurred in 1980, the ozone depleting tax in 1989. Congress plainly understood that even in instances where a tax was not explicitly directed to be treated like a customs duty, it would not embrace FTZ admitted goods, unless expressly included within the statute. Shielding FTZ admissions from HMT imposition is even more compelling by virtue of § 4462(f)(1)'s customs duty treatment directive.

on qualifying imports under 19 U.S.C. § 1309(a)[3]. The HMT statute contains no § 1309(a) exemption.

Moreover, not only is respondent's reliance upon the principle of *expressio unius est exclusio alterius* undermined by the *Citgo* decision, but that same principle in two different contexts affirmatively supports petitioner's contention that FTZ admissions are not embraced by the HMT. As previously explained, Congress' statutory construct of other federal exactions demonstrates that for FTZ admissions to be encompassed by the HMT the term "United States" must expressly be defined as including foreign-trade zones. "United States" was not so defined for HMT purposes. Additionally, had Congress wanted to limit the customs administrative and enforcement provisions which apply to an exaction being treated like a customs duty, Congress would have so stated. For example, in 19 U.S.C. § 58c(g)(2), in language virtually identical to 26 U.S.C. § 4462(f)(1),[4] Congress provided that all administrative and enforcement provisions of customs laws were to apply to the Merchandise Processing Fee (MPF) as if the fee were a customs duty, with one exception — the drawback provisions.[5] Congress' failure

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3. In pertinent part, § 1309(a) provides that imported goods destined for certain specified uses, e.g., supplies for aircraft actually engaged in foreign trade, can be removed from bonded warehouses and foreign-trade zones "free of duty and internal revenue taxes." *Citgo* held, and Customs now accepts, that § 1309(a) qualifying goods are exempt from the HMT. In view of Customs' recognition of a § 1309(a) exemption, it is particularly difficult to fathom respondent's continued assertion that only exemptions expressly set forth in the HMT statute can apply.

4. *See* Pet. 23-24 n.13 for a side-by-side comparison of the two provisions.

5. Where FTZ provisions prevent the imposition of duties and excise taxes on foreign goods admitted to a FTZ, the drawback (Cont'd)

to define "United States" as including FTZs, or to exclude the FTZ provisions from the body of customs laws which were to apply to the HMT, are powerful and persuasive indications that Congress intended FTZ provisions apply to the HMT.

3. The respondent contends that the formulation in § 4462(f)(1), whereby all administrative and enforcement provisions of the customs laws shall apply to the HMT "as if such tax were a customs duty," necessarily recognizes that the HMT is not a customs duty. Br. in Op. 8.

Succinctly stated, petitioner's contention has never been that the HMT is a customs duty, but rather that it is an excise tax which must be *treated as if it were a customs duty* for purposes of all customs administrative and enforcement provisions, including 19 U.S.C. § 81c(a). Designation of an exaction as a customs duty and treatment of an exaction as if it were a customs duty are identifiably different standards, which, in this instance, lead to the same result. For example, 19 U.S.C. § 1528 disjunctively provides that a tax or other charge shall be construed to be a customs duty if the tax or charge has either been designated a customs duty "*or* contains a provision to the effect that it shall be treated as a duty imposed under the customs laws." Distinct standards, same treatment.

While not disputing respondent's observation that Congress chose not to designate the HMT a customs duty,[6] it is equally

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provisions provide a means to receive duty refunds on imported goods subsequently exported from the United States. In Customs Headquarters Ruling 227638, Pet. App. 41a-57a, Customs ruled that the FTZ provisions applied to the MPF because, unlike the drawback provisions, the FTZ provisions were *not* excluded from MPF customs duty treatment.

6. Reasons why Congress chose not to designate the HMT a customs duty and instead opted for treatment as if it were a customs duty are suggested in the HMT's legislative history. *See* Pet. 10 n.6.

true that Congress directed that the HMT be treated like a customs duty for "all administrative and enforcement provisions of the customs laws." 26 U.S.C. § 4462(f)(1). That statutory formulation is sufficient to place a customs administrative and enforcement overlay on how the HMT statute is to be construed and interpreted. This reading of the HMT statute was the very basis upon which respondent recently informed this Court that "Congress elected to treat the Harbor Maintenance Tax as a customs duty, rather than as an internal revenue tax." Government's Opposition to the Petition for Writ of Certiorari in *IBM Corp. v. United States*, Docket No. 00-482, at 5.[7]

CONCLUSION

For the reasons set forth in both our petition and our reply briefs, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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7. Emphasizing that the HMT must be treated as a customs duty, respondent successfully argued for the non-payment of interest on HMT payments unconstitutionally collected on exports. *IBM Corp. v. United States*, 201 F.3d 1367 (Fed. Cir. 2000), *cert. denied*, 121 S. Ct. 1167 (2001).